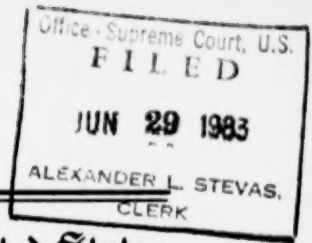


No. 82-1450



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***In the Supreme Court of the United States***

OCTOBER TERM, 1982

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IN RE MILTON PHILIP SCHULMAN, PETITIONER

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT*

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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### **QUESTION PRESENTED**

Whether the disciplinary action in this case violated petitioner's procedural due-process right to notice of the charges against him.

**(1)**

## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statement .....	1
Argument .....	7
Conclusion .....	9

## TABLE OF AUTHORITIES

### Cases:

<i>Burr, Ex parte</i> , 22 U.S. (9 Wheat.) 529 .....	7
<i>Carroll, In re</i> , 416 F.2d 585, cert. denied, 396 U.S. 1011 .....	7
<i>Chopak, In re</i> , 160 F.2d 886, cert. denied, 331 U.S. 835 .....	7
<i>Patterson, In re</i> , 176 F.2d 966 .....	7
<i>Rudolph v. United States</i> , 370 U.S. 269 .....	8
<i>Ruffalo, In re</i> , 390 U.S. 544 .....	7, 8
<i>Schulman, In re</i> , 599 F.2d 1056, cert. denied, 444 U.S. 838 .....	2
<i>Tacon v. Arizona</i> , 410 U.S. 351 .....	8

### Statutes:

42 U.S.C. 1981 .....	2
42 U.S.C. 1982 .....	2

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## **OPINIONS BELOW**

The order of the court of appeals (Pet. App. A1-A32) is not yet reported. An earlier opinion of the court of appeals is noted at 599 F.2d 1056 (table), cert. denied, 444 U.S. 838. The opinion of the district court (Pet. App. A33-A66) is not reported.

## **JURISDICTION**

The judgment of the court of appeals was entered on November 30, 1982. The petition for a writ of certioari was filed on February 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

This is a disciplinary proceeding against petitioner, an attorney, in the United States District Court for the Northern District of Ohio. Following a hearing, the district court ordered petitioner to fulfill certain conditions designed to demonstrate his professional competency and responsibility prior to any further practice in the Northern District of Ohio (Pet. App. A33-A66). The court of appeals affirmed (Pet. App. A1-A32).

1. The conduct that gave rise to this disciplinary proceeding is fully described in the district court's opinion (Pet. App. A39-A59) and may be summarized as follows. In September 1978 a civil suit alleging racial discrimination in housing was filed under 42 U.S.C. 1981 and 1982 in the United States District Court for the Northern District of Ohio. *Ford v. Kinzel*, Civil No. C 78-1169. Petitioner, "a septuagenarian and \* \* \* solo \* \* \* practitioner[,] \* \* \* appeared unassisted \* \* \* as counsel for defendants and had no previous experience in either civil rights cases or federal litigation" (Pet. App. A40). During the course of the trial petitioner was summarily cited for contempt on three occasions. In addition, following the trial, the district judge disbarred petitioner and imposed extensive conditions for his readmission. On appeal from that ruling, the court of appeals upheld the contempt citations but remanded the disbarment proceedings for a hearing before a different district judge. *In re Schulman*, 599 F.2d 1056 (6th Cir.) (table), cert. denied, 444 U.S. 838 (1979).

On remand, the United States Attorney, acting at the behest of the district court, filed formal disciplinary charges against petitioner (Pet. App. A61-A66).<sup>1</sup> These charges alleged "unprofessional courtroom conduct [by petitioner] during the course of the civil proceedings in \* \* \* *Ford v. Kinzel*" (*id.* at A33). More particularly, the allegations

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<sup>1</sup>These charges were taken in haec verba from the original memorandum of the district court. See 78-1824 Pet. App. 41-46. In addition to the portion of the memorandum incorporated in the statement of charges, the court also found that petitioner had "persisted in his wilful disregard of the most elementary standards of professional conduct in a calculated effort to disrupt and obstruct the resolution of th[e] litigation" (*id.* at 39) and had "not only demonstrated a total disregard for fundamental standards of professional courtesy, competence, and deportment, but \* \* \* [engaged in] a calculated and wilful endeavor to subvert the orderly procedures mandated by the rules and orders governing the practice of law in this Court, necessary for the due administration of justice" (*id.* at 46).

against petitioner contained a "general charge that [petitioner] intentionally pursued a course of conduct designed and calculated to disrupt the orderly resolution of \* \* \* *Ford v. Kinzel*" (*id.* at A39) and "[t]wenty specific acts of misconduct" (*ibid.*). In the remand proceeding the district court, in addition to reviewing the record in *Ford v. Kinzel*, also heard the live testimony of seven witnesses and received written evidence and other submissions.

Based on "the clear and convincing weight of th[is] evidence" (Pet. App. A40), and mindful of the "conflict inherent in every disciplinary proceeding \* \* \* [between] 'the public interest and the attorney's right to continue to practice a profession imbued with public trust' " (*id.* at A53-A54; citation omitted), the court found against petitioner. The court considered "four general categories of courtroom misconduct in[to] which [the] twenty specifications charged are grouped \* \* \* [with some specifications coming within more than one category]" (*id.* at A40).

The first category of misconduct involved petitioner's failure in pretrial proceedings to comply with the basic federal and local rules applicable to civil litigation. Though the district court faulted petitioner's conduct, it found that this specification was not proved (Pet. App. A41-A42).

The second category of misconduct dealt with 10 specifications of petitioner's demeaning attitude and conduct toward witnesses and improper attempts to influence the jury (Pet. App. A42-A45); it was this conduct that had led to the three contempt citations against petitioner. For example, during side bar conferences, petitioner repeatedly presented arguments in a manner audible to the jury and made facial expressions and gestures demonstrating his dissatisfaction with the court's rulings. A further example of such misconduct was shown in petitioner's attempts to demean witnesses through wholly irrelevant inquiries into

such areas as marital problems, the use of tranquilizers, and living arrangements among unmarried people. The district court found that petitioner had "consistently projected a hostile demeanor toward \* \* \* witnesses" (*id.* at A43), had asked "many \* \* \* questions [that] had no legitimate evidentiary basis" (*ibid.*), had displayed an "outrageously demeaning and contemptuous attitude \* \* \* toward many of the witnesses" (*id.* at A44), had used "gesticulations \* \* \* calculated to prejudice the jury" (*ibid.*), and had "consciously engaged in a trial strategy designed to draw upon theatrics and the improper use and misrepresentation of evidence to prejudice the jury" (*id.* at A45).

The third category of misconduct by petitioner concerned 10 specifications of disrespectful remarks to the trial judge and refusal to comply with proper court procedures and orders (Pet. App. A45-A48). For example, petitioner refused to recognize the finality of the court's evidentiary rulings and continued to press his contentions in an argumentative and defiant manner before the jury. Indeed, petitioner's "challenge to the patience of the trial judge rose to the level of derision" (*id.* at A47). Furthermore, the district court found that petitioner "lacks the basic working knowledge of the Federal Rules of Evidence and the Federal Rules of Civil Procedure \* \* \* [that] is quintessential to the competent discharge of a federal practitioner's professional responsibilities \* \* \* [and] lack[s] \* \* \* competency in \* \* \* fundamental areas of trial practice" (*ibid.*).

The fourth category, involving eight specifications, pertained to the substantial delays that resulted from petitioner's lack of professional competence and his persistent courtroom misconduct (Pet. App. A48-A49). For example, petitioner's failure to premark trial exhibits caused significant delays while petitioner made "[r]andom searches" through stacks of papers for a desired exhibit (*id.* at A48).

Moreover, his improper courtroom demeanor caused the trial judge on several instances to send the jury out so that petitioner could be admonished. And petitioner's "lack of knowledge in some of the most basic areas of trial practice and procedure compelled the trial judge to halt the proceedings on a number of occasions" (*id.* at A48-A49). This "courtroom conduct of [petitioner] extended what should have been a two day trial into a five day affair" (*id.* at A49).

In defense of his conduct, petitioner offered medical evidence designed to show that he suffered from a partial hearing loss and that his unprofessional courtroom behavior was a consequence of chemotherapy treatments (Pet. App. A49-A53). In rebuttal to the latter evidence, the government offered the transcript of a state civil trial<sup>2</sup> in which petitioner's behavior as trial counsel—at a time prior to the commencement of his chemotherapy—was marked by similar episodes of courtroom misconduct. The district court found that petitioner "suffers from a hearing impediment that makes it physically impossible for him to function unassisted as a trial attorney" (*id.* at A50) and that "[n]o explanation \* \* \* has been offered for [petitioner's] apparent failure to seek corrective treatment [for his hearing problem] sufficient to satisfy the demands of trial practice" (*id.* at A49). In addition, the court determined that the evidence that petitioner's "behavioral problems were a direct result of his chemotherapy \* \* \* [was] inconclusive" (*id.* at A51) and "strip[ped] \* \* \* of probative value" (*id.* at A53).

In light of these findings, the district court ordered that petitioner not be permitted to practice in the United States District Court for the Northern District of Ohio until he

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<sup>2</sup> *Levy v. Stokes*, No. 884,045 (Ohio, Cuyahoga County C.P.).



complied with four conditions (Pet. App. A59-A61). First, petitioner must subscribe to an oath of affirmation that he will abide by the ABA Code of Professional Responsibility and all local district court rules. Second, petitioner must demonstrate through a sworn affidavit that he is proficient in and understands the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence, as well as the local district court rules and the ABA Code of Professional Responsibility. Third, petitioner must attend and observe six contested testimonial trials in the district court, at least three of which are to be jury trials. Fourth, due to his hearing loss, petitioner must be assisted by co-counsel in any future district court proceeding in which he may participate.<sup>3</sup>

2) 2. The court of appeals affirmed (Pet. App. A1-A32). The court, while not disapproving any of the district court's factual findings, rejected the conclusion that petitioner "knowingly and willfully pursued a course of conduct designed and calculated to disrupt the orderly resolution of the litigation in *Ford v. King*" (*id.* at A3). However, it held that "the evidence did . . . warrant the restrictions and conditions placed upon [petitioner's] ability to remain a member of the bar of the United States District Court for the Northern District of Ohio" and that petitioner's "conduct went far beyond an honest good faith effort to present his client's case" (*ibid.*). One judge dissented from this holding on the grounds that the majority's decision embodied a different basis for disciplinary relief than did the district court's order and that petitioner had not in fact acted in bad faith (*id.* at A4-A32).

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<sup>3</sup>The court of appeals modified this last condition to permit petitioner to appear without co-counsel if he can show that his hearing impediment has been remedied by means of a corrective device (Pet. App. A3).

### ARGUMENT

The court of appeals in this case expressly held "that the evidence \* \* \* warrant[s] the restrictions and conditions placed upon [petitioner's] ability to remain a member of the bar" (Pet. App. A3), and petitioner does not challenge the sufficiency of the extensive record and thorough findings to support the disciplinary action against him. Likewise, he does not contest the appropriateness of the conditions imposed for his continued membership in the bar in light of the record and findings.<sup>4</sup> Rather, his sole claim is that his procedural due-process right to notice was violated because the court of appeals affirmed the disciplinary order against him on a basis that was not presented in the district court. Further review of this claim is not warranted.

It is well established that a lawyer subject to disbarment is "entitled to procedural due process, which includes fair notice of the charge." *In re Ruffalo*, 390 U.S. 544, 550 (1968). Petitioner asks this Court to apply that standard to the particular facts of this case to determine whether the specific notice afforded him was adequate. This, however,

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<sup>4</sup>It is clear that the sanctions imposed by the district court were wholly reasonable and specifically fashioned to remedy the manifest inadequacies in petitioner's qualifications as a practitioner in federal district court. Petitioner has not been disbarred from practice for any fixed term but rather, much like a civil contemnor, holds the key to his readmission in his pocket. It is required of him only that he demonstrate proficiency with respect to the ethical and procedural rules governing federal practice; that he undergo certain modest remedial instruction in federal trial practice (certified attendance at six federal trials); and that he make provision to assure that his hearing impediment does not present an obstacle to the discharge of his responsibilities as a trial attorney. These conditions are well within the district court's sound discretion and remedial authority. See *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 530-531 (1824); *In re Carroll*, 416 F.2d 585, 587 (10th Cir. 1969), cert. denied, 396 U.S. 1011 (1970); *In re Patterson*, 176 F.2d 966, 967 n.1 (9th Cir. 1949); *In re Chopak*, 160 F.2d 886 (2d Cir.), cert. denied, 331 U.S. 835 (1947).

"is primarily a factual issue which does not \* \* \* justify the exercise of [the Court's] certiorari jurisdiction" (*Tacon v. Arizona*, 410 U.S. 351, 352 (1972)), and its resolution "would be of no importance save to the litigants themselves" (*Rudolph v. United States*, 370 U.S. 269, 270 (1962)). In these circumstances, review by this Court is not called for.

Moreover, it cannot be doubted that petitioner was given "notice \* \* \* of the charges \* \* \* and [an] opportunity \* \* \* for explanation and defence" (*In re Ruffalo, supra*, 390 U.S. at 550; citation omitted). The 20 numbered paragraphs set forth in the formal charges identified in detail and with specificity the exact conduct of petitioner that was at issue. The district court held a full evidentiary hearing and received live testimony and written evidence on behalf of petitioner. And counsel for petitioner vigorously and ably contested each of the allegations contained in the charge against petitioner (see petitioner's C.A. Br. 26-69), and also presented affirmative defenses based on petitioner's health (Pet. App. A49-A53) and his legal obligation zealously to represent his client in the *Ford* litigation (Pet. App. A54-A55). Petitioner does not contend that he was uncertain about the matters in controversy or that his defense was prejudiced in any way. To the contrary, petitioner was accorded a full and fair opportunity to answer the charges against him. Thus, however the charges are viewed and whatever the relationship between the general and the specific charges, petitioner was not denied his right to fundamental procedural fairness.<sup>5</sup>

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<sup>5</sup>Furthermore, the nature of the remedial conditions imposed by the district court—which were specifically fashioned not to disbar petitioner unconditionally but instead to ensure future compliance with basic standards of federal trial practice (see page 7 note 4, *supra*)—refutes the notion that the court viewed the proceeding as limited to the

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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**JUNE 1983**

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issue of the " 'knowing[] and willful[] pursu[it of] a course of conduct both prior to and throughout the trial of [*Ford v. Kinzel*] designed and calculated to disrupt the orderly resolution of the litigation' " (Pet. 3; citation omitted).